

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument the parties stipulated that claimant's average weekly wage was: (1) \$455.20 at the time of her accident; (2) \$464.40 per week commencing February 1, 2006, which includes a \$9.20 per week contribution by respondent to claimant's IRA; and (3) \$515.40 commencing November 1, 2009, which includes the \$9.20 per week contribution by respondent to claimant's IRA and \$51.00 per week respondent paid for claimant's health, dental and vision insurance premiums. The parties stipulated that the wages claimant earned after leaving respondent's employment are accurately set out in ALJ Moore's Award.

ISSUES

In the August 31, 2012, Award, ALJ Moore determined claimant sustained a 5% whole body functional impairment, a 27% task loss, and various periods of permanent partial disability following claimant's November 30, 2005, work-related accident (the last period beginning July 1, 2011, when claimant had a 100% wage loss and a 63.5% work disability). The ALJ awarded claimant temporary total disability and permanent partial disability benefits. With regard to future medical benefits, the ALJ stated:

As Claimant has not required medical treatment for her low back complaints for over six years, since being released by Dr. Halford as having achieved maximum medical improvement on August 10, 2006, it appears exceedingly unlikely that any request for future medical care will be attributable to the November 30, 2005 work injury.¹

Respondent maintains the Award should be reversed with a finding that claimant has not proven any permanent partial impairment resulting from her work-related accident and is not entitled to any permanent partial disability benefits. If the Board finds that claimant is entitled to permanent partial disability benefits, respondent contends claimant's award should be based upon a 0% task loss.

Claimant contends she has a 15% whole body functional impairment and an 80% task loss and requests the Board modify the Award accordingly. She also requests an award for future medical benefits.

The issues before the Board on this appeal are:

1. Did claimant sustain a permanent functional impairment as a result of her November 30, 2005, accident?
2. If so, what is claimant's functional impairment?
3. Did claimant sustain a work disability as a result of her injury?
4. If so, what is claimant's work disability?
5. Is claimant entitled to future medical benefits?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

¹ ALJ Award (Aug. 31, 2012) at 11.

Claimant injured her low back in a work-related accident on November 30, 2005, while working for respondent. ALJ Moore's description of claimant's preexisting back condition, how the November 30, 2005, accident occurred, claimant's subsequent medical treatment and her evaluations by Drs. John F. McMaster and Edward J. Prostig are detailed and need not be repeated here. Only additional facts or those facts the Board deems significant are set out below.

From February 9, 2006, through August 10, 2006, Dr. Jeff Halford, certified by the American Board of Physical Medicine & Rehabilitation, provided medical treatment for claimant. Dr. Halford testified he was not an expert in the *Guides*.² He did not know if in Kansas, whether an aggravation, acceleration or intensification of a preexisting injury is considered a new injury. One of Dr. Halford's final recommendations was that claimant should receive a surgical consultation for her back condition.

On direct examination, Dr. Halford testified that claimant's low back symptoms were related to her preexisting spine impairments and that she had no new structural lesion in her spine as a result of the November 2005 accident. Dr. Halford also opined claimant had a temporary elevation of her symptoms from the November 2005 injury and no evidence of an additional spine-related impairment. It was also the opinion of Dr. Halford that claimant would have no additional restrictions as the result of her 2005 injury and that claimant could perform all job tasks performed by her in the 15 years prior to the accident as identified by vocational expert Steve Benjamin. However, Dr. Halford did impose restrictions on April 6, 2006, of lifting no more than 25 pounds and changing positions frequently, and that when he released claimant, she was to follow those restrictions to prevent additional exacerbation of her pain.

Dr. Halford indicated that it was very unusual that claimant was free of symptoms after her 2004 surgery, given the nature of the surgery. He knew of Dr. Tomecek, who performed claimant's 2004 surgery, but had not reviewed any of Dr. Tomecek's records. Dr. Halford acknowledged that as the result of her November 2005 injury, claimant had increased back pain, which is a symptom. He also admitted that claimant has had back pain for longer than six months, which is considered chronic pain. Dr. Halford went on to testify that since claimant had experienced back pain since 2005, it was likely she would have back pain for a long time. He would not go so far as to say claimant's back pain was permanent. A further discussion of Dr. Halford's treatment of claimant, opinions and testimony is set out in ALJ Moore's Award.

Dr. John F. McMaster reviewed the medical records of claimant, but did not have access to any of her diagnostic studies. Dr. McMaster had claimant complete a functional assessment questionnaire and noted that claimant reported increased difficulty and

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

inability to perform a number of common activities of daily living because of the November 2005 occupational incident. It was the opinion of Dr. McMaster that before claimant's 2005 injury, the highest DRE category she could be in would be DRE Lumbosacral Category III. Dr. McMaster testified that as a result of her 2005 accident, claimant would be in DRE Lumbosacral Category I. On several occasions, Dr. McMaster refused to agree that claimant's 2005 injury would place her in DRE Lumbosacral Category II. Dr. McMaster indicated the DRE method, not the range of motion method, should be used to determine claimant's functional impairment. Dr. McMaster testified that claimant sustained no task loss as a result of her work injury. A copy of the section in the *Guides* containing DRE lumbosacral categories was made an exhibit at Dr. McMaster's deposition.

Dr. Edward J. Prostic opined that as a result of her November 30, 2005 accident, claimant sustained a recurrent herniation of the disc at L4-5. This was based, in part, on an MRI that was ordered by Dr. Gillis, claimant's treating physician, after the November 30, 2005, accident. The MRI showed disc desiccation with a broad-based disc bulge at L3-4 and disc desiccation with central to left paracentral disc herniation at L4-5.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁴

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁵

Respondent asserts that although claimant, following her 2005 accident, developed chronic pain, she sustained no additional permanent functional impairment to the low back. Respondent relies on Drs. Halford and McMaster. Their opinion was that claimant's 2005 accident was merely a temporary exacerbation. Respondent argues claimant's accident did not permanently aggravate her preexisting injury or cause permanent restrictions or increased permanent disability.

³ K.S.A. 2005 Supp. 44-501(a).

⁴ K.S.A. 2005 Supp. 44-508(g).

⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Following her 2004 surgery, claimant was released without restrictions and returned to her regular job duties. Dr. Prostic opined and claimant alleged her November 30, 2005, accident aggravated her preexisting back condition, resulting in a permanent functional impairment and disability. ALJ Moore agreed with claimant on this issue, as does the Board.

An EMG study performed by Dr. Halford demonstrated that claimant had L4-5 radiculopathy. An MRI reviewed by Dr. Halford showed an abnormal spine with degenerative changes at L3-4 and L4-5. He attributed the MRI and EMG results to a chronic condition, rather than an acute injury. That ignores the fact that since claimant's accident she has developed a loss of range of motion, ongoing back pain and radiculopathy. Dr. Halford's opinion that claimant's back injury is not work related is tainted by the fact he was unfamiliar with that part of the pre-May 15, 2011, Kansas Workers Compensation Act that provides an aggravation or acceleration of a preexisting condition is compensable. Also, Dr. Halford had never reviewed claimant's pre-accident medical records from Dr. Tomecek. Simply put, claimant proved by a preponderance of the evidence that her November 30, 2005, injuries resulted in a permanent impairment and disability.

In *Tovar*,⁶ one physician opined claimant sustained a 2% functional impairment in each hand, a second physician opined claimant sustained a 2% functional impairment in the left hand and a 3% functional impairment in the right hand, and a third physician opined claimant had a 15% functional impairment to each side (which included the forearm, wrist and hand). A district court judge deciding the claim found claimant sustained a 9% functional impairment to each arm. Claimant asserted that the district court should have adopted the opinion of the third physician, as he was the only doctor who testified claimant sustained injuries to his wrists and forearms. The Kansas Court of Appeals affirmed the district court on this issue and stated, "The ultimate decision concerning the extent and nature of the disability is one which must be made by the trial court on the basis of the evidence presented. As we pointed out earlier, the trial court is not bound by the medical evidence presented in the case and has the responsibility of making its own determination."⁷

Tovar allows ALJ Moore to determine the nature and extent of claimant's disability based upon the evidence that was presented. After reviewing all the evidence, ALJ Moore concluded claimant qualified for a 5% functional impairment under DRE Lumbosacral Category II under the *Guides*. ALJ Moore found claimant had a nonuniform loss of range of motion and nonverifiable radicular complaints. He noted that an EMG showed evidence of radiculopathy, but that Dr. Halford opined it may not be related to claimant's work injury.

⁶ *Id.*

⁷ *Id.*, at 785.

The Board finds nothing in the record to persuade it to disturb ALJ Moore's findings concerning claimant's functional impairment.

The post injury wages of claimant are not in dispute. Respondent argued claimant had no task loss. The ALJ gave equal weight to the opinions of Drs. Halford, McMaster and Prostic and found claimant had a 27% task loss. The Board concurs and adopts the analysis and conclusions of law set out on pages 9 and 10 of ALJ Moore's Award. The parties stipulated that as of November 1, 2009, claimant lost an additional \$51.00 per week in fringe benefits. Accordingly, the table on pages 10 and 11 of ALJ Moore's Award is modified as follows:

Dates	Wage Loss	Task Loss	Work Disability
11/30/05 to 2/1/06	0% / Comp. Wage	N/A	0%
2/1/06 to 2/1/07	22.5% wage loss	27%	24.75%
2/1/07 to 3/1/09	14% wage loss	27%	20.5%
3/1/09 to 11/1/09	0% / Comp. Wage	27%	0%
11/1/09 to 3/1/10	49% wage loss	27%	38%
3/1/10 to 3/1/11	42% wage loss	27%	34.5%
3/1/11 to 5/1/11	40% wage loss	27%	33.5%
5/1/11 to 7/1/11	58% wage loss	27%	42.5%
7/1/11 forward	100% wage loss	27%	63.5%

Claimant testified that since reaching maximum medical improvement, she has been seeing her family physician on occasion, and he has been prescribing claimant Lortab. K.S.A. 2005 Supp. 44-510h(a) requires an employer to provide an injured worker the services of a health care provider. The Board reverses the ALJ's ruling that claimant is not entitled to future medical treatment.

CONCLUSION

1. Claimant proved by a preponderance of the evidence that she sustained a 5% permanent whole body functional impairment as the result of her work accident on November 30, 2005.

2. Claimant sustained work disability as set out in the above table.

3. Upon proper application to and approval by the Director, claimant is entitled to future medical benefits.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁸ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the August 31, 2012, Award entered by ALJ Moore as follows:

Tracy L. Carson-Duke is granted compensation from Pressure Cast Products, Inc., and its insurance carrier for a November 30, 2005, accident and resulting disability. Based upon an average weekly wage of \$455.20, for the period ending January 31, 2006, Ms. Carson-Duke is entitled to receive 1.86 weeks of temporary total disability benefits at \$303.48 per week, or \$564.47, followed by 7 weeks of permanent partial general disability benefits at \$303.48 per week, or \$2,124.36, for a 5% whole body functional impairment.

Based upon an average weekly wage of \$464.40, for the period from February 1, 2006, through January 31, 2007, Ms. Carson-Duke is entitled to receive 52.14 weeks of permanent partial general disability benefits at \$309.62 per week, or \$16,143.59, for a 24.75% work disability.

For the period from February 1, 2007, through February 28, 2009, Ms. Carson-Duke is entitled to receive 25.94 weeks of permanent partial general disability benefits at \$309.62 per week, or \$8,031.54, for a 20.5% work disability.

For the period from March 1, 2009, through October 31, 2009, Ms. Carson-Duke is entitled to receive 13.75 weeks of permanent partial general disability benefits at \$309.62 per week, or \$4,257.28, for a 5% whole body functional impairment.

Based upon an average weekly wage of \$515.40, for the period from November 1, 2009, through February 28, 2010, Ms. Carson-Duke is entitled to receive 17.14 weeks of permanent partial general disability benefits at \$343.62 per week, or \$5,889.65, for a 38% work disability.

For the period from March 1, 2010, through February 28, 2011, Ms. Carson-Duke is entitled to receive 27.21 weeks of permanent partial general disability benefits at \$343.62 per week, or \$9,349.90, for a 34.5% work disability.

⁸ K.S.A. 2012 Supp. 44-555c(k).

For the period from March 1, 2011, through April 30, 2011, Ms. Carson-Duke is entitled to receive no weeks of permanent partial general disability benefits for a 33.5% work disability due to the accelerated payout provisions of the Workers Compensation Act.

For the period from May 1, 2011, through June 30, 2011, Ms. Carson-Duke is entitled to receive 8.71 weeks of permanent partial general disability benefits at \$343.62 per week, or \$2,992.93, for a 42.5% work disability.

Beginning July 1, 2011, Ms. Carson-Duke is entitled to receive 111.64 weeks of permanent partial general disability benefits at \$343.62 per week, or \$38,361.74, for a 63.5% work disability. The total award is \$87,715.46.

As of April 2, 2013, Ms. Carson-Duke is entitled to receive 1.86 weeks of temporary total disability compensation at \$303.48 per week in the sum of \$564.47, followed by 7 weeks of permanent partial general disability compensation at \$303.48 per week in the sum of \$2,124.36, followed by 91.83 weeks of permanent partial general disability compensation at \$309.62 per week in the sum of \$28,432.40, followed by 144.77 weeks of permanent partial general disability compensation at \$343.62 per week in the sum of \$49,745.87, for a total due and owing of \$80,867.10, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$6,848.36 shall be paid at \$343.62 per week until paid or until further order of the Director.

Upon proper application to and approval by the Director, claimant is entitled to future medical benefits.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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